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No. 89-1646

In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

MARCUS S. SMITH, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act supercedes the Gonzalez Act and deprives the Smiths of the cause of action against a military physician expressly recognized in subsection (f) of the Gonzalez Act for medical negligence committed within the scope of his military medical duties overseas.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CITATIONS iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 10

I. THE COURT OF APPEALS DID NOT ERR IN REVERSING THE DISTRICT COURT ORDER WHICH SUBSTITUTED THE UNITED STATES AS DEFENDANT AND DISMISSED THE SMITHS' ACTION AGAINST DR. MARSHALL 10

A. THE COURT OF APPEALS CORRECTLY HELD THAT THE GONZALEZ ACT AUTHORIZES SUIT AGAINST DR. MARSHALL AND ENTITLES HIM TO IMMUNITY FROM PERSONAL LIABILITY FOR THE RESULTING JUDGMENT 10

i. The court of appeals construed and applied the Gonzalez Act in accordance with its express language 10

ii. The court of appeals' construction of the Gonzalez Act accords with Congress' intent as expressed in the legislative history 14

iii. The court of appeals' holding is consistent with the majority of case authorities that have construed the express language and legislative history of the Gonzalez Act 20

TABLE OF CONTENTS – Continued

Page

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT DOES NOT SUPERCEDE, IMPLIEDLY REPEAL OR AMEND THE GONZALEZ ACT 27

i. The FELRTCA does not expressly repeal or amend the Gonzalez Act.. 27

ii. The FELRTCA does not impliedly repeal or amend the Gonzalez Act.. 33

iii. The court of appeals' holding is consistent with the only other case authority addressing the relationship between the Gonzalez Act and the FELRTCA 43

iv. The court of appeals' holding accords with the manifest purposes of the Gonzalez Act and the FELRTCA 44

CONCLUSION 47

APPENDIX
SECNAV Instruction 6300.3 JAG: 14C (March 14, 1978) 1a

TABLE OF CITATIONS

Page

CASES:

Afonso v. City of Boston, 587 F. Supp. 1342 (D.Mass. 1984) 21, 24, 25, 26

Anderson v. O'Donoghue, 677 P.2d 648 (Okla. 1983) .21, 23

Barr v. Matteo, 360 U.S. 564 (1959) 36

Bradley v. Kissinger, 418 F. Supp. 64 (D.D.C. 1976) 35

Briscoe v. LaHue, 460 U.S. 325 (1983) 29

Burchfield v. Regents of University of Colorado, 516 F. Supp. 1301 (D.Colo. 1981) 21

Carchman v. Nash, 473 U.S. 716 (1985) 10

Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 27, 46

Chew Heong v. United States, 112 U.S. 536 (1884) 36

Consumer Product Safety Com'n. v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 10

Cort v. Ash, 422 U.S. 66 (1975) 31, 32

Doherty v. United States, 404 U.S. 28 (1971) 14

Foley Bros. v. Filardo, 336 U.S. 281 (1949) 12

Garcia v. United States, 469 U.S. 70 (1984) 18

Hercules Incorporated v. Environmental Protection Agency, 598 F.2d 91 (D.C. Cir. 1978) 12

Hust v. Moore-McCormack Lines, Inc., 328 U.S. 707 (1946) 14

TABLE OF CITATIONS – Continued

Page

International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 518 F.2d 913 (9th Cir. 1975) 18

Johansen v. United States, 343 U.S. 427 (1952) 42

Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977) . 15, 21, 22

Mastro Plastics Corp. v. National Labor Relations Bd., 350 U.S. 270 (1956) 14

Miller v. Federal Mine Safety and Health Review Com'n., 687 F.2d 194 (7th Cir. 1982) 18

Morton v. Mancari, 417 U.S. 535 (1974) 34, 35

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 29

Newman v. Soballe, 871 F.2d 969 (11th Cir. 1989) .....*passim*

Pelphrey v. United States, 674 F.2d 243 (4th Cir. (1982) 21, 24

Piper v. Chris-Craft Industries, 430 U.S. 1 (1977) 31

Posadas v. National City Bank of New York, 296 U.S. 497 (1936) 35

Powers v. Schultz, 821 F.2d 295 (5th Cir. 1987) 26

Rayonier, Incorporated v. United States, 352 U.S. 315 (1957) 38

Rector, Etc. of Holy Trinity v. United States, 143 U.S. 457 (1892) 14

Rodriguez v. United States, 480 U.S. 522 (1987) 29

Saratoga Sav. and Loan Ass'n. v. Federal Home Loan Bank of San Francisco, 724 F. Supp. 683 (N.D. Cal. 1989) 29, 30

Smith v. Marshall, 885 F.2d 650 (9th Cir. 1989) ... *passim*

TABLE OF CITATIONS – Continued

Page

State of South Carolina v. Stoll, 84 U.S. (17 Wall.) 425 (1873) 36

Tenney v. Brandhove, 341 U.S. 367 (1951) 29

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 31

United States v. Fausto, 484 U.S. 439 (1988) 28, 35

United States v. Fields, 783 F.2d 1382 (9th Cir. 1986) .10, 11

United States v. Hansen, 772 F.2d 940 (D.C. Cir.), *cert. denied*, 475 U.S. 1045 (1986) 27

United States v. Monia, 317 U.S. 424 (1943) 14

United States v. Morton, 467 U.S. 822 (1984)..... 10

United States v. Oregon, 366 U.S. 643 (1961)..... 33

United States v. Public Utilities Commission, 345 U.S. 295 (1953) 33

United States v. Tynan, 78 U.S. (11 Wall.) 88 (1870) 35

United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) 14

United States v. Vuitch, 402 U.S. 62 (1971) 35

United States v. Welden, 377 U.S. 95 (1964)..... 41

Washington v. U.S. Postal Service, 1980 W.L. 36239 (N.D. Ill. 1990) 29, 30

Westfall v. Erwin, 484 U.S. 292 (1988)..... 36, 37, 38, 39

Wood v. United States, 41 U.S. (16 Pet.) 342 (1842) .35, 36

TABLE OF CITATIONS – Continued

Page

STATUTES AND REGULATIONS:

Federal Drivers Act:
28 U.S.C. § 2679(b)-(e) (1982) 8, 28, 30

Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567: ..... *passim*
28 U.S.C. § 2679(b)(2)(B)..... 28, 29, 30, 31, 37, 46

Federal Tort Claims Act:
28 U.S.C. § 1346(b) 40
28 U.S.C. § 2671-2680..... 19
28 U.S.C. § 2672..... 16
28 U.S.C. § 2680..... 44
28 U.S.C. § 2680(h) 40
28 U.S.C. § 2680(k) 2, 4

Gonzalez Act:
10 U.S.C. § 1089..... *passim*
10 U.S.C. § 1089(a) 17, 23, 24, 25, 29, 39, 40
10 U.S.C. § 1089(c) 12, 17, 25, 26
10 U.S.C. § 1089(e) 41
10 U.S.C. § 1089(f)..... *passim*

10 U.S.C. § 1054.....8, 32
22 U.S.C. § 2702.....8, 32
28 U.S.C. § 1332..... 2
38 U.S.C. § 4116..... 8, 19, 32, 40
42 U.S.C. § 233..... 8, 19, 32

TABLE OF CITATIONS – Continued

Page

42 U.S.C. § 1985 30

42 U.S.C. § 2458(a) 8, 32

32 C.F.R. Part 61 ..... 3, 12

32 C.F.R. § 536.14 3

32 C.F.R. § 750.24(a), (b)(2) 12

SECNAV Instruction 6300.3, JAG: 14C (March 14, 1978) 7, 13, 26, 32

MISCELLANEOUS:

Federal Rule of Civil Procedure 44.1 37

H. Rep. 100-700, 100th Cong. 2d Sess. 1, 1988 U.S. Code Cong. and Admin. News 5945 ..... 9, 28, 30, 33, 36, 37

Hearings on S. 1395 and H.R. 3954 Before the Subcommittee on General Legislation of the Committee on Armed Services, United States Senate, 94th Cong., 2d Sess. (March 2, August 27 and September 10, 1976) 18, 19, 20

Hearings on H.R. 3954 to Provide Statutory Relief from Individual Liability in Malpractice Actions against Military Medical Personnel, Before the Subcommittee on Military Personnel of the Committee on Armed Services, House of Representatives, 94th Cong. (June 5, 1975 and June 17, 1975) 18, 21

TABLE OF CITATIONS – Continued

Page

2A Sands, Sutherland Statutory Construction (4th ed. 1984)

§ 22.30 41

§ 49.03 12

§ 53.01 14

S. Rep. No. 94-1264, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 4443 ..... *passim*

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BRIEF FOR THE RESPONDENTS

Respondents Marcus, Hildegard and Dominique Smith respectfully ask this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 26, 1989.

STATEMENT OF THE CASE

On August 18, 1987, Marcus and Hildegard Smith filed a medical negligence action in the United States District Court for the Central District of California

against military physician William Marshall, M.D. ("Dr. Marshall") to recover for brain-devastation their son Dominique suffered during his birth at an American military hospital in Vicenza, Italy. Federal jurisdiction was based on diversity of citizenship. *See* 28 U.S.C. § 1332.

In November, 1987, the United States filed a Motion to Substitute the United States as the Defendant and to Dismiss the action pursuant to the Medical Malpractice Immunity Act, 10 U.S.C. § 1089, the federal statute which governs the liability *vel non* of military physicians for torts committed within the scope of their military medical duties overseas ("the Gonzalez Act").

In the Motion, the United States asserted that subsection (a) of the Gonzalez Act makes suit against the United States under the Federal Tort Claims Act the exclusive remedy for the negligence of military physicians, that the United States should be substituted as the defendant in lieu of Dr. Marshall pursuant to subsection (c) of the Gonzalez Act, and that the action should be dismissed because the United States retains sovereign immunity for all claims arising in foreign countries[1]. *See* 28 U.S.C. § 2680(k).

The Smiths asked the court to deny the Motion on the ground, *inter alia*, that subsection (f) of the Gonzalez Act expressly permits a medical malpractice claimant to sue a

[1] Because the United States retains sovereign immunity for all claims arising overseas, 28 U.S.C. § 2680(k), the Smiths did not pursue a judicial remedy against the United States.

military physician as an individual for medical negligence arising overseas and that subsection (f) requires the United States to indemnify the physician for any judgment entered against him. 10 U.S.C. § 1089(f), 32 C.F.R. Part 61, 32 C.F.R. § 536.14.

On January 14, 1988, the district court granted the Motion, substituted the United States as defendant, and entered a final judgment dismissing the action for lack of subject matter jurisdiction.[2] From this order, the Smiths appealed to the United States Court of Appeals for the Ninth Circuit.

During the pendency of that appeal, after the filing of briefs and the presentation of oral argument, the United States Court of Appeals for the Eleventh Circuit issued its opinion in *Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989). In that case, the Eleventh Circuit held that the Gonzalez Act permits suit against a military physician for medical negligence occurring overseas and requires the United States to indemnify the physician for any judgment entered against him.

The United States subsequently withdrew the Gonzalez Act argument, thereby conceding that the

[2] At the time judgment was entered, the United States had not issued a certification as to whether the conduct on which the Complaint is based was within the scope of Dr. Marshall's employment. This certification was issued over two years later, on March 26, 1990, two months after the United States Court of Appeals for the Ninth Circuit denied the United States' Petition for Rehearing.

Gonzalez Act authorizes suit against Dr. Marshall for medical negligence committed by him overseas and entitles him to immunity from personal liability in the form of indemnification for any judgment subsequently entered against him.

In place of its Gonzalez Act argument, the United States asserted that Dr. Marshall was entitled to absolute immunity from suit pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567 ["the FELRTCA"], an amendment to the Federal Tort Claims Act enacted during the pendency of the Ninth Circuit appeal. Although the FELRTCA does not purport to address the immunity *vel non* of military physicians for torts committed overseas, the United States argued that the FELRTCA should be applied in this case to supercede the Gonzalez Act, to require the substitution of the United States as defendant, and to require the dismissal of the Smiths' action pursuant to the foreign country exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(k). The United States relied solely upon this interpretation of the FELRTCA to support its contention that Dr. Marshall was entitled to absolute immunity. *See* Pet. App. at 3a.[3]

The court of appeals denied the United States' request to withdraw its Gonzalez Act argument, properly noting that the district court had dismissed the Smiths'

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[3] Citations to "Pet. App." are to the Appendix to the Petition for Certiorari.

action on the basis of that argument, and delineated the issues before it as follows; 1) whether an American military physician working in a foreign country is immune from a malpractice suit under the Gonzalez Act; and 2) whether an American military physician working in a foreign country is immune from suit under the FELRTCA. *See Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), Pet. App. at 1a-2a.

Based on the express language and legislative history of the Gonzalez Act, the court of appeals concluded that subsection (f) of the Gonzalez Act authorizes the Smiths to maintain suit against an individual military physician for medical negligence committed within the scope of his military medical duties overseas and entitles Dr. Marshall to immunity from personal liability for any judgment entered against him in that action. Pet. App. at 4a-5a.

Based on the express language and legislative history of the FELRTCA, the court of appeals held that the FELRTCA does not "take away" the Smiths' cause of action against Dr. Marshall or otherwise bar medical malpractice claims cognizable under the Gonzalez Act for the medical negligence of military physicians overseas. Pet. App. at 12-13a.

The court of appeals consequently reversed the district court order substituting the United States as defendant in place of Dr. Marshall, reversed the district court order dismissing the action, and remanded the action to the district court for further proceedings against Dr. Marshall. Pet. App. at 14a.

Significantly, the United States has conceded that the court of appeals correctly decided the Gonzalez Act issue[4] and has appealed only from the ruling that the FELRTCA does not absolutely immunize Dr. Marshall from suit or otherwise "take away" the Smiths' Gonzalez Act remedy.

SUMMARY OF THE ARGUMENT

The court of appeals properly reversed the district court order which dismissed the Smiths' medical negligence action and properly remanded the action to the district court for further proceedings against Dr. Marshall. This ruling was based on a proper construction and application of the Gonzalez Act, 10 U.S.C. § 1089, the federal statute which governs the liability *vel non* of military physicians for claims based on negligence committed within the scope of their military medical duties overseas. The ruling was also based on a proper finding that the FELRTCA did not supercede or take away the Smiths' Gonzalez Act remedy.

In particular, the court of appeals properly held that subsection (f) of the Gonzalez Act expressly permits the Smiths to sue a military physician for medical negligence

[4] After reviewing *Newman v. Soballe*, 871 F.2d at 969, and other decisions, the Department of Justice conceded that the Gonzalez Act does not require dismissal in medical malpractice cases and that it will no longer file motions of the kind that resulted in the dismissal of the Smiths' Complaint. *See* Brief for Petitioners at 5, n.2.

claims arising in a foreign country and permits the United States to indemnify the physician for the judgment entered against him in that action. *See* 10 U.S.C. § 1089(f); Pet. App. at 4a-5a.

This construction of the language of the Gonzalez Act finds additional express support in the federal regulation implementing the Gonzalez Act, SECNAV Instruction 6300.3, JAG; 14C (March 14, 1978), which mandates that the United States shall pay judgments entered against military physicians based on medical negligence claims arising in foreign countries. *See* Apx. at 1.

The holding of the court of appeals also accords with Congress' intent as expressed in the legislative history of the Gonzalez Act. *See* S. Rep. No. 92-1264, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 4443.

In particular, the legislative history demonstrates that Congress intended to enact a two-part scheme of immunity that would protect military medical personnel from personal liability for malpractice judgments and would simultaneously preserve a means of compensating victims of military medical negligence committed in the United States and abroad. *Id.* The first part of this scheme was to foreclose a medical malpractice claimant's ability to choose between two viable defendants (the United States or the individual physician) by making suit against the United States under the Federal Tort Claims Act an "exclusive remedy", thereby precluding suit against the individual physician. *Id.* As the legislative history demonstrates, Congress recognized that the immunity conferred by the "exclusive remedy" language of subsection (a) was limited by the reach of Federal Tort Claims Act jurisdiction and that where such jurisdiction did

not extend (to claims arising in foreign countries, for example) military physicians would continue to be susceptible to suit and personally liable for malpractice judgments entered against them as individuals.

In recognition of this, the "second principle purpose of the [Gonzalez Act]" was to protect the military physician from personal liability for malpractice judgments entered against him in circumstances where the statutory framework of the Federal Tort Claims Act provided no remedy to a claimant (and consequently no protection to a physician) by "authoriz[ing] the Secretary of Defense to hold harmless or provide liability insurance for any defense medical personnel in situations where a remedy under the Federal Tort Claims Act would be precluded." *See* S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. and Admin. News at 4444. *See also Newman v. Soballe*, 871 F.2d at 973 and legislative history cited therein.

In *Smith*, the court of appeals properly held that the FELRTCA did not supercede or take away the Smiths' Gonzalez Act remedy. Pet. App. at 12a. Indeed, nothing in the language of the FELRTCA evidences an intent to supercede the Gonzalez Act or the host of pre-FELRTCA immunity statutes tailored to the concerns of specific branches or functions of government. *See e.g.* 22 U.S.C. § 2702 (1980) (immunity statute covering State Department employees); 38 U.S.C. § 4116 (1965) (immunity statute covering Veterans Administration employees); 42 U.S.C. § 2458a (1976) (immunity statute covering NASA employees); 42 U.S.C. § 233 (1970) (immunity statute covering Public Health Service employees); 10 U.S.C. § 1054 (1986) (immunity statute covering Department of Defense legal personnel).

The legislative history confirms that the FELRTCA was expressly designed to immunize from personal tort liability only those employees not already protected by other immunity statutes, that Congress did not intend to amend or supercede pre-existing immunity statutes, and consequently that the court of appeals properly held that the FELRTCA did not supercede the Gonzalez Act. *See* H. Rep. 100-700, 100th Cong. 2d Sess. 1, 1988 U.S. Code Cong. and Admin. News 5945.

In the only other case addressing whether the FELRTCA supercedes a pre-existing federal immunity statute, the United States Court of Appeals for the Eleventh Circuit construed the language and legislative history of the Gonzalez Act and the FELRTCA and properly concluded that the military physician-defendant was specifically protected by the Gonzalez Act and was therefore not among those federal employees affected by the FELRTCA. *See Newman v. Soballe*, 871 F.2d at 969.

As such, established principles of statutory construction support the court of appeals' holding that Dr. Marshall is susceptible to suit under the Gonzalez Act and is entitled to immunity from personal liability for any judgment entered against him in the Smiths' action.

If the United States were to prevail on the position advanced in its Brief, the parents of a severely injured tort victim, now eight years old and without cognitive life, will never recover damages that would at least address the enormous cost of caring for their brain-devastated child, and a military physician will avoid a judgment for which the United States is required by the applicable statute and implementing regulations to indemnify him. The court of appeals in *Smith* properly held that the FELRTCA does not support this result and that the Gonzalez Act expressly precludes it.

THE COURT OF APPEALS DID NOT ERR IN REVERSING THE DISTRICT COURT ORDER WHICH SUBSTITUTED THE UNITED STATES AS DEFENDANT AND DISMISSED THE SMITHS' ACTION AGAINST DR. MARSHALL

A. THE COURT OF APPEALS CORRECTLY HELD THAT THE GONZALEZ ACT AUTHORIZES SUIT AGAINST DR. MARSHALL AND ENTITLES HIM TO IMMUNITY FROM PERSONAL LIABILITY FOR THE RESULTING JUDGMENT

i. The court of appeals construed and applied the Gonzalez Act in accordance with its expiess language.

In *Smith*, the court of appeals properly held that the Gonzalez Act authorizes a medical malpractice claimant to sue a military physician for medical negligence occurring overseas and entitles the physician to immunity from personal liability for the resulting judgment. Pet. App. at 4a-6a.

In reaching this conclusion, the court of appeals properly applied well-established principles of statutory construction, *e.g.*, the starting point in statutory construction is the language of the statute itself, *Consumer Product Safety Com'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 106 (1980), a statute must be construed as a whole, *Carchman v. Nash*, 473 U.S. 716, 743, n. 11 (1985), and meaning must be attributed to each subsection of a statute. *United States v. Morton*, 467 U.S. 822, 828 (1984); *United States v. Fields*, 783 F.2d 1382 (9th Cir. 1986).

In particular, the court of appeals reasoned that although subsection (a) of the Gonzalez Act refers to the

exclusivity of a remedy against the United States, subsection (f) unequivocally authorizes the relevant agency head to indemnify or provide insurance for a military physician with respect to claims arising in three situations: when the physician is 1) serving in a foreign country; 2) assigned to work in a non-federal facility; or 3) "if the circumstances are such as are likely to preclude the remedies of third persons against the United States as described in [the Federal Tort Claims Act.]"[5] 10 U.S.C. § 1089(f); Pet. App. at 4a-5a. The court of appeals further reasoned that to accord Dr. Marshall absolute immunity would negate the plain meaning of subsection (f), rendering it "virtually meaningless" in violation of the well-established rule that meaning must be attributed to all subsections of a statute. Pet. App. at 5a, *citing United States v. Fields*, 783 F.2d at 1382.

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[5] 10 U.S.C. § 1089(f) states:

> (f) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

See Pet. App. at 30a.

The court of appeals' holding finds further express statutory support in subsection (c) of the Gonzalez Act, which permits the remand to state court of all claims against individual physicians which arise under circumstances precluding a federal tort claim remedy against the United States. That subsection states:

> (c) . . . Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

10 U.S.C. § 1089(c), Pet. App. at 29a.

Finally, it is well-settled that the administrative regulations promulgated by the agency or other instrumentality charged with enforcing a statute should be attributed weight in determining the meaning of a statute. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Hercules Incorporated v. Environmental Protection Agency*, 598 F.2d 91 (D.C. Cir. 1978). *See also* 2A Sands, Sutherland Statutory Construction § 49.03 (4th ed. 1984). In this case, the court of appeals' interpretation of the Gonzalez Act unequivocally accords with the implementing regulation formulated under authority of the Secretary of the Navy[6]. *See*

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[6] The Secretary of Defense delegated to the Secretary of each Military Department the authority to hold physicians harmless or to provide insurance. *See* 32 C.F.R. Part 61. Although Dr. Marshall was a member of the Army, the Secretary of the Navy has single-service responsibility for all claims arising in Italy. *See* 32 C.F.R. § 750.24 (a),(b)(2).

SECNAV Instruction 6300.3, JAG: 14C (March 14, 1978), Apx. at 1. In pertinent part, that regulation states:

> 6. *Extent of Protection.* [The Gonzalez Act] extends coverage within the United States and its possessions by making suit against the United States under the Federal Tort Claims Act the exclusive remedy for an injured party. Where the Federal Tort Claims Act does not apply (as, for example, where the acts giving rise to the claim occurred outside the United States), coverage is provided by allowing the Secretary of Defense to hold harmless or provide liability insurance for health care personnel.
>
> 7. *Exercise of Authority.* * * * All persons referred to in . . . subsection (a) of [the Gonzalez Act] *are hereby held harmless for damages* resulting from negligent or wrongful acts or omissions while acting within the scope of duties and assigned to duty in a foreign country, or detailed for service with other than a Federal Agency, or if the circumstances are such as are likely to preclude remedy against the United States under the Federal Tort Claims Act, as provided by subsection (f) of reference (b).

See Apx. at 2a (emphasis supplied).

As such, the express language of the Gonzalez Act and the applicable implementing regulation establish that the court of appeals correctly held that Dr. Marshall is susceptible to suit under the Gonzalez Act for medical negligence claims arising in foreign countries and is entitled to immunity from personal liability for any judgment entered against him in that action.

ii. The court of appeals' construction of the Gonzalez Act accords with Congress' intent as expressed in the legislative history

It is well-settled that legislation is never written on a clean slate, read in isolation or applied in a vacuum. *Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707 (1946); *Doherty v. United States*, 404 U.S. 28 (1971). *See also* 2A Sands, Sutherland Statutory Construction at § 53.01. Although a court may pronounce upon the purpose of a statute without referring to its historical background, the legal history of a statute, including prior statutes on the same subject, is a valuable guide for determining the intent, meaning and object of a statute. *United States v. Monia*, 317 U.S. 424 (1943); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952).

In *Smith*, the court of appeals analyzed the principal source of legislative history, the Senate Report of the Committee on Armed Services,[7] and properly concluded that Congress did not enact the Gonzalez Act to absolutely immunize Dr. Marshall from suit or to leave people like the Smiths without a judicial remedy, Pet. App. at 6a-7a, *citing* S. Rep. No. 94-1264, 94th Congress, 2d Sess. 9-10, 13-14, *reprinted in* 1976 U.S. Code Cong. and Admin.

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[7] This Court has often recognized that the report of the committee in each House of Congress which investigated the desirability of the statute under consideration is a prime source for determining Congressional intent, particularly where, as in the Report here at issue, the committee has set forth its grounds for recommending passage of the proposed bill and its understanding of the nature and effect of the measure. *See e.g., Rector, Etc. of Holy Trinity v. United States*, 143 U.S. 457, 464 (1892); *Mastro Plastics Corp. v. National Labor Relations Bd.*, 350 U.S. 270 (1956).

News 4443, 4451, 4454-55; *Newman v. Soballe*, 871 F.2d at 972-3; *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977) (en banc).

Analysis of the Senate Report confirms that the court of appeals in *Smith* correctly interpreted and applied the Gonzalez Act. In particular, the legislative history demonstrates that Congress intended to enact a two-part scheme of immunity that would protect military medical personnel from personal liability for malpractice judgments and would simultaneously preserve a means of compensating victims of military medical negligence committed in the United States and abroad.[8] *See* S. Rep. No. 94-1264, 94th Cong., *supra*, 1976 U.S. Code Cong. and Admin. News at 4443.

The first part of this scheme was to foreclose a medical malpractice claimant's ability to choose between two

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[8] As set forth in the legislative history, Congress considered several alternative approaches to protecting defense medical personnel from personal liability for malpractice, including providing indemnification programs and special insurance coverage for *all* such physicians in their individual capacities (a protective scheme under which the existing Federal Tort Claim framework would not be utilized at all) but ultimately chose to immunize certain medical personnel through application of the Federal Tort Claims Act because this alternative did not require any new statutory structure or governmental organization and would be less expensive than providing insurance coverage for *all* defense medical personnel. S. Rep. No. 94-1264, 94th Cong., *supra*, 1976 U.S. Code Cong. and Admin. News at 4447-4448 (emphasis supplied). Clearly, these considerations do not bespeak an intent to foreclose a remedy, only an intent to provide a complete remedy as inexpensively and efficiently as possible.

viable defendants (the United States or the individual physician) by making suit against the United States under the Federal Tort Claims Act an "exclusive remedy", thereby precluding suit against the individual physician. As the legislative history demonstrates, Congress recognized that the immunity conferred by the "exclusive remedy" language of subsection (a) was limited by the reach of Federal Tort Claims Act jurisdiction and that where such jurisdiction did not extend (to claims arising in foreign countries, for example) military physicians would continue to be susceptible to suit and personally liable for malpractice judgments entered against them as individuals.

In recognition of this, the "second principle purpose of the [Gonzalez Act]" was to protect the military physician from personal liability for malpractice judgments entered against him in circumstances where the statutory framework of the Federal Tort Claims Act provided no remedy to a claimant (and consequently no protection to a physician) by "authoriz[ing] the Secretary of Defense to hold harmless or provide liability insurance for any defense medical personnel in situations where a remedy under the Federal Tort Claims Act would be precluded." *See* S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. and Admin. News at 4444. *See also Newman v. Soballe*, 871 F.2d at 973 and legislative history cited therein.

Thus, the Senate Report describes the relationship between subsections (a) and (f) as follows:

> Subsection (a) of the new section 1089 [would make] the remedy against the United States provided by 28 U.S.C. 1346(b) and 28 U.S.C. 2672 the exclusive remedy for damages arising from medical malpractice by certain U.S. medical personnel. . . . [The Federal Tort Claims Act] makes the United States liable, under the local law of

> the place where the tort occurred, in the same manner and to the same extent as a private individual under like circumstances. . . . Suits for damages for personal injury against such medical personnel in their individual capacities are precluded. The sole remedy would be against the United States . . .
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> Subsection (f) would authorize the appropriate Secretary to hold harmless or provide liability insurance for medical personnel described in subsection (a). *The purpose of this section again is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable. The Federal Tort Claims Act does not apply to actions arising in a foreign country.* Also when a medical personnel is assigned to other than a federal department – for example, as part of his military training a doctor is assigned to a private hospital – he may not be covered under the Federal Tort Claims Act. *Subsection (f) authorizes the appropriate Secretary to provide protection through indemnification or insurance to medical personnel in those situations.*

S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. & Admin. News at 4443, 4450-51 (emphasis supplied).

To implement this statutory scheme, subsection (c) of the Gonzalez Act expressly provides that an action shall be remanded to state court when a remedy by suit within the meaning of subsection (a) is not available against the United States. *See* 10 U.S.C. § 1089(c), Pet. App. at 29a. Significantly, the legislative history of subsection (c) expressly contemplates that, under this section,

> [if] a district court remands the case upon a determination that a remedy by suit under the

> Federal Tort Claims Act *would not be available against the United States, the protection available to medical personnel is set forth in subsection (f).*

S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. & Admin. News at 4450-1 (emphasis supplied).

It is well-settled that statements in the principal committee report are powerful evidence of legislative purpose and may be given effect even in cases where the intent of the legislature is imperfectly expressed in the statute itself. *See e.g., International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975); *Miller v. Federal Mine Safety and Health Review Com'n.*, 687 F.2d 194 (7th Cir. 1982). In this case, the legislative history of the Gonzalez Act confirms the plain meaning of subsection (f) and virtually required the court of appeals to find, as it did, that military medical malpractice committed in a military hospital in the United States is defended by the United States through its substitution as the proper party defendant, while military medical malpractice committed abroad is defended by the individual with the United States providing indemnity or insurance.[9] *See* S. Rep. No. 94-1264, *supra*, 1976 U.S. Code

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[9] While testimony given during Congressional hearings is generally accorded little weight, *Garcia v. United States*, 469 U.S. 70, 76 (1984), it should be noted that testimony given in connection with the Gonzalez Act also supports the court of appeals' holding that military physicians are not absolutely immune from suits based on claims arising in foreign countries or under other circumstances precluding a federal tort claim remedy. *See e.g.*, Hearings on S. 1395 and H.R. 3954 Before the Subcommittee on General Legislation of the Committee on Armed Services, United States Senate, 94th Cong., 2d Sess. (March 2, August 27 and September 10, 1976); Hearings on

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Cong. and Admin. News at 4443. *See also Newman v. Soballe*, 871 F.2d at 972.

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H.R. 3954 to Provide Statutory Relief from Individual Liability in Malpractice Actions against Military Medical Personnel, Before the Subcommittee on Military Personnel of the Committee on Armed Services, House of Representatives, 94th Cong. (June 5, 1975 and June 17, 1975), pp. 26-29.

At the Senate hearing on the Gonzalez Bill (S. 1395 and H.R. 3954) before the Subcommittee on General Legislation of the Committee on Armed Services, Brigadier General Walter D. Reed, the Assistant Judge Advocate General of the United States Air Force, articulated:

> . . . there are a number of situations in which suit against the United States is not possible. For example, the United States cannot be sued under the (so-called) Federal Tort Claims Act (28 U.S.C. 1346(b), 2671-2680) for claims arising in a foreign country, though other statutes allow the payment of claims – but not suits – in those cases. . . . Or, again, the alleged malpractice may have occurred when the military member was detailed to an agency of a State or a private institution. Finally, there is always the possibility of a suit in a court of a foreign country in circumstances where protection under a treaty, other international agreement, or foreign law is either nonexistent or unavailable.
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> S. 1395 would, if enacted, accomplish the purpose of removing the risk of malpractice litigation to the extent that it is possible for United States law to do so. It appears to have been modeled on the Veterans' Administration and Public Health Service law (38 U.S.C. 4116 and 42 U.S.C. 233). In effect, it makes the so-called Federal Tort Claims Act the exclusive remedy in malpractice and negligence cases involving

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iii. The court of appeals' holding is consistent with the majority of case authorities that have construed the express language and legislative history of the Gonzalez Act

As the court of appeals observed in *Smith v. Marshall*, the conclusion that Dr. Marshall is not entitled to absolute

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> medical care and treatment by active duty military health professionals in the performance of their duties, *but only to the extent that law – slightly modified – now allows suits against the United States.*
>
> *Beyond that, the bill relies upon a grant of authority to the Secretary of Defense to hold the health professional harmless, or provide liability insurance for him, to protect him from suits for personal injury or death negligently caused by him in the performance of his medical or related duties.*

See e.g., Hearings on S. 1395 and H.R. 3954 Before the Committee on Armed Services, United States Senate, 94th Cong., 2d Sess. (March 2, August 27 and September 10, 1976 (emphasis supplied).

Similarly, at the Hearing before the Subcommittee on General Legislation of the Committee on Armed Services, Senator Strom Thurmond summarized the two-part scheme of immunity set forth in the Gonzalez Bill as follows:

> This bill would make the remedy against the United States under the Federal Tort Claims Act the exclusive remedy for claims of damage for personal injuries or death arising from alleged malpractice on the part of any active duty medical personnel. *The bill also provides a grant of authority to the Secretary of Defense to hold harmless or provide insurance coverage for personnel performing medical service where provisions of the Federal Tort Claims Act may not be applicable.*

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immunity under the Gonzalez Act is consistent with the position of the majority of courts which have interpreted the Gonzalez Act.[10] Pet. App. at 6a. *See Newman v. Soballe*, 871 F.2d at 970; *Pelphrey v. United States*, 674 F.2d 243 (4th Cir. 1982); *Jackson v. Kelly*, 557 F.2d at 735; *Burchfield v. Regents of University of Colorado*, 516 F. Supp. 1301 (D. Colo. 1982); *Anderson v. O'Donoghue*, 677 P.2d 648 (Okla. 1983); *Afonso v. City of Boston*, 587 F. Supp. 1342 (D. Mass. 1984).

In *Newman v. Soballe*, 871 F.2d at 970, the United States Court of Appeals for the Eleventh Circuit held that neither the Gonzalez Act nor the FELRTCA required the substitution of the United States for the military physician or the dismissal of a medical malpractice action based on the negligence of a military physician practicing abroad. In particular, the Eleventh Circuit held that subsection (f) of the Gonzalez Act and its legislative history plainly establish that Congress intended for military physicians to be susceptible to suit for medical negligence claims arising overseas and entitled to immunity from

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See Malpractice Protection to Defense Medical Personnel, Hearings on S. 1395 and H.R. 3954 Before the Subcommittee on General Legislation of the Committee on Armed Services, United States Senate, 94th Cong., 2d Sess. at pp. 10-12 (March 2, August 27 and September 10, 1976), (emphasis supplied).

[10] The court of appeals properly noted that most of the cases on which the United States relied did not involve the construction of statutory provisions analogous to subsection (f) of the Gonzalez Act and were therefore inapposite. Pet. App. at 7a. This is also true of the cases cited in the Brief for Petitioner. *See generally*, Brief for Petitioner at 18-25.

personal liability for the resulting judgment. The Eleventh Circuit's review of the language and legislative history of the FELRTCA established that the FELRTCA was expressly designed to immunize from personal tort liability those federal employees not already protected by other federal immunity statutes and therefore did not apply to the defendant or other military physicians whose immunity *vel non* from personal tort liability is governed by the Gonzalez Act. *See Newman v. Soballe*, 871 F.2d at 970.

In *Jackson v. Kelly*, 557 F.2d at 735, the United States Court of Appeals for the Tenth Circuit analyzed the express language and legislative history of the Gonzalez Act and concluded that the Gonzalez Act permits suit against an individual military physician where the claimants have no federal tort claim remedy, that the indemnification provision of subsection (f) is premised upon the liability of military medical personnel in the first instance, and that to find otherwise would contravene the language and purpose of subsection (f).[11] The Tenth

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[11] In *Jackson v. Kelly*, 557 F.2d at 735, the Tenth Circuit emphasized that:

> [granting the defendant-physician] official immunity would not only make 10 U.S.C. § 1089(f) superfluous, it would contravene one of Congress' aims in enacting § 1089(f) in its present form. Instead of granting military medical personnel practicing in foreign countries absolute immunity from suit for acts within the scope of their employment, Congress elected to have the government protect them through indemnification or insurance. The effect of this approach rather than absolute immunity is to ensure

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Circuit's analysis appropriately established that Congress did not intend to foreclose the remedies of malpractice victims who have no alternate remedy against the United States, but intended to provide a method for the United States to assume responsibility for damage claims against its military medical personnel arising from medical care rendered within the scope of their employment in foreign countries, to protect military medical personnel from personal liability, and to relieve military medical personnel of the expense of supplying private malpractice insurance while simultaneously preserving a means to compensate victims of their medical negligence. *Id.* at 741, *citing* 1976 U.S. Code Cong. and Admin. News at 4443. *See also Anderson v. O'Donoghue, M.D.*, 677 P.2d at 648.

In *Anderson v. O'Donoghue, M.D.*, 677 P.2d at 648, the defendant was a military physician assigned to a civilian hospital, a non-federal facility within the meaning of subsection (f) of the Gonzalez Act. In a medical malpractice action arising out of his conduct at that hospital, the physician argued that subsection (a) of the Gonzalez Act absolutely immunized him from suit. After analyzing the express language of the Gonzalez Act, particularly the

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> a remedy to victims of malpractice by military medical personnel assigned to a foreign country. If we were to grant official immunity to military medical personnel in foreign countries, then malpractice victims would lose this remedy because the government's responsibility for damage claims under § 1089(f) is premised on the liability of military medical personnel in the first instance.

557 F.2d at 740-1.

relationship between subsections (a) and (f), the Supreme Court of Oklahoma concluded that subsection (f) expressly permits suit to proceed against individual physicians in their personal capacities.

The court reasoned that although subsection (a) provides for an exclusive remedy against the United States, the indemnification provision of subsection (f) "recognizes [that] there is an exception carved from § 1089(a) allowing a party to bring an action against the military physician personally." *Id.* at 651. The court explained that "if this court held that under subsection (a) an action could not be brought personally against the physician where the requirements of subsection (f) are met, the entirety of subsection (f) would be rendered a nullity because there could be no suit against the military physician at all. Statutes must be construed to give meaning to each portion thereof and not so that a statute is rendered superfluous." *Id.* The court therefore concluded that established principles of statutory construction mandated a finding that the physician was subject to suit and entitled to indemnification from personal liability for the resulting judgment pursuant to 10 U.S.C. § 1089(f).

Similarly, in *Pelphrey v. United States*, 674 F.2d at 243, the United States Court of Appeals for the Fourth Circuit analyzed the Gonzalez Act and concluded that military medical personnel acting in foreign countries are subject to personal liability for medical malpractice but may be protected by the Secretary of Defense through indemnification or insurance.[12] *See also Afonso v. City*

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[12] In *Pelphrey v. United States*, the Fourth Circuit articulated:

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of Boston, 587 F. Supp. 1342 (D. Mass. 1984)[13]

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> The statute, as we read it, merely authorizes the Secretary of Defense to provide protection, either through indemnification or insurance, to foreign based military medical personnel who are subject to personal liability (citation omitted). Whereas military medical personnel acting within the United States are immune from personal liability because the [Federal Tort Claims Act] is the exclusive remedy for military medical malpractice arising in the United States, see 10 U.S.C. § 1089(a), military medical personnel acting in a foreign country are personally liable for malpractice because the [Federal Tort Claims Act] does not apply to "any claim arising in a foreign country." Thus, the need for special protection by foreign based medical personnel stems from the very fact that malpractice claims against them are exempt from the [Federal Tort Claims Act].
>
> The legislative history of § 1089(f) supports this interpretation. . . . (citation omitted).

674 F.2d at 246.

[13] In *Afonso v. City of Boston*, 587 F. Supp. at 1342, the United States District Court for the District of Massachusetts analyzed the language and legislative history of the Gonzalez Act and appropriately concluded that a military physician is not entitled to absolute immunity unless a federal tort claim remedy obtains against the United States. *Afonso* was a negligence action against the military physician who treated the civilian plaintiff while in residency training at a private university hospital. The United States subsequently petitioned for removal of the action, for substitution of the United States for the individual defendant pursuant to subsections (a) and (c) of the Gonzalez Act, and for dismissal of the action based on the expiration of the two-year Federal Tort Claims Act statute of limitations. The plaintiff opposed these motions on the

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As such, the holding of the court of appeals is consistent with the express language of the Gonzalez Act, its legislative history, and with the holdings of the majority of courts that have construed the Gonzalez Act.[14]

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ground, *inter alia*, that the physician was entitled to qualified immunity and indemnification pursuant to subsection (f). The issue before the Court in *Afonso* was whether the United States may maintain that a physician is a federal employee for the purpose of converting the action against the individual into an action against the United States while at the same time preserving a defense to the United States' vicarious liability for the acts of the physician. *Id.* at 1344. The court resolved this issue in the negative because, *inter alia*, its review of the Gonzalez Act and the legislative history established the following: 1) that under the circumstances described in subsection (f), a physician "may be within the scope of his military duties *and* acting in a way that would not create vicarious liability for the United States"; 2) that Congress anticipated that an individual military physician would *not* be immune from suit under these circumstances; and 3) that Congress enacted the indemnification provision of subsection (f) to protect the military physician from personal liability in these circumstances. *Id.* at 1345. The court therefore denied the United States' Motions to Substitute and Dismiss and remanded the case to state court pursuant to 10 U.S.C. § 1089(c) for proceedings against the military physician in his individual capacity.

[14] *Cf. Powers v. Schultz*, 821 F.2d 295 (5th Cir. 1987), in which the Fifth Circuit held that subsection (f) indemnification was available only to physicians sued in foreign courts. In *Smith*, the court of appeals distinguished and declined to follow *Powers* on the well-taken ground that neither the language nor legislative history of the Gonzalez Act supports this limitation. Pet. App. at 8a-9a. See S. Rep. 94-1264, *supra*, 1976 U.S. Code Cong. and Admin. News at 4443. The holding in *Powers* is also contrary to the implementing regulation which governs the availability of subsection (f) indemnification. See SECNAV Instruction 6300.3, JA6:14C, Apx. at 1.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT DOES NOT SUPERCEDE, IMPLIEDLY REPEAL OR AMEND THE GONZALEZ ACT

It is well-settled that the function of this court is to review judgments, not opinions, and that the underlying issue is always whether a legal error resulted in an erroneous judgment. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Because the United States has properly conceded that Dr. Marshall is susceptible to suit under the Gonzalez Act, the only issue is whether the court of appeals properly held that the FELRTCA did not "take away" or otherwise circumscribe the Smiths' remedy by suit against Dr. Marshall. Pet. App. at 12a-13a. As set forth *infra*, established principles of statutory construction require the Court to find that the FELRTCA did not amend or repeal the Gonzalez Act and hence that *Smith* was properly decided.

i. The FELRTCA does not expressly repeal or amend the Gonzalez Act.

It is presumed that when Congress intends to amend or repeal a statute, it will expressly do so. *United States v. Hansen*, 772 F.2d 940, 945 (D.C. Cir.), *cert. denied*, 475 U.S. 1045 (1986). That the Gonzalez Act has never been materially amended or expressly repealed necessarily supports the court of appeals' finding that it continues to govern the immunity *vel non* of military physicians for medical negligence committed within the scope of employment.

It is also presumed that Congress legislates with knowledge of existing related statutes and will expressly designate those statutory provisions whose application it wishes to suspend rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction. *Id. See also United States v. Fausto*, 484 U.S. 439 (1988). In this case, the legislative history confirms that Congress knew when it enacted the FELRTCA that the Gonzalez Act governed the immunity *vel non* of military physicians. *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News. at 5948. *See also* discussion at Section B(ii), *infra*. Thus, Congress' failure to expressly suspend any provision of the Gonzalez Act necessarily gives rise to the presumption that Congress did not do so.

In addition, by enacting the FELRTCA as an amendment to the Federal Tort Claims Act, 28 U.S.C. § 2679(b)-(e), the only statute Congress integrated into the FELRTCA's immunizing scheme was the Federal Driver's Act, formerly codified at 28 U.S.C. § 2679(b)-(e), the substantive provisions of which were almost identical to the FELRTCA. That Congress did not amend or integrate the Gonzalez Act in this fashion also supports a finding that the Gonzalez Act continues to govern Dr. Marshall's immunity *vel non* for medical negligence claims arising overseas.

Erroneously, the United States asserts that the FELRTCA's reference to "all federal employees" compelled the court of appeals to find that the FELRTCA absolutely immunizes all federal employees in all circumstances except those expressly enumerated in subsection (b)(2)(B). *See* Brief of Petitioner at 31. This Court has

repeatedly articulated that such all-encompassing statutory language is not to be literally construed. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325 (1983); *Tenney v. Brandhove*, 341 U.S. 367 (1951) ("every person" as used in Civil Rights statute cannot be taken literally); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-688 (1978) ("every contract" as used in Sherman Act cannot be taken literally). To decline to construe such language literally is especially appropriate where, as here, a literal construction would effect an implied repeal of the Gonzalez Act without the requisite clear and convincing evidence that Congress intended to repeal that Act. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987). *See also* discussion at Section B(ii) *infra*.

Far from evidencing an intent to repeal the Gonzalez Act, the FELRTCA expressly contemplates that it shall not be construed in derogation of other federal statutes which authorize actions against individual federal employees. *See* 28 U.S.C. § 2679(b)(2)(B), Pet. App. at 22a. In particular, subsection (b)(2)(B) (Section 5 of the FELRTCA) states that the exclusive remedy provision on which the United States relies "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States . . . or for a violation of a statute of the United States under which such action against an individual is otherwise authorized." *Id.*

While the United States asserts that the Smiths' Gonzalez Act suit against a military physician is not "brought for a *violation* of a federal statute", the authorities have not construed Section 2679(b)(2)(B) in so restrictive a fashion. *See Washington v. U.S. Postal Service*, 1990 W.L. 36239 (N.D. Ill. 1990); *Saratoga Sav. and Loan*

Ass'n. v. Federal Home Loan Bank of San Francisco, 724 F. Supp. 683 (N.D. Cal. 1989).[15]

More significantly, the legislative history unequivocally confirms that Congress intended for subsection (b)(2)(B) to effectively preserve *all* causes of action arising under federal statutes:

> Section 5 would amend section 2679(b) of title 28 to provide for substitution of the United States as the defendant in cases where the Federal employees [sic] acting in the course and scope of employment. The remedy against the United States would be exclusive, and would preclude any other action or civil suit for money damages from being lodged against the Federal employee or his estate based upon the same conduct. It also would make it clear that the remedy provided in this legislation does not extend to constitutional torts *or to causes of action specifically authorized to be brought against an individual by another statute of the United States.*

H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. & Admin. News at 5952. (emphasis supplied).

Moreover, by enacting the FELRTCA as an amendment to section 2679(b)-(e) of the Federal Tort Claims Act

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[15] In *Washington v. U.S. Postal Service*, 1990 W.L. at 36239, the court held that the FELRTCA does not immunize an individual federal employee from suit under 42 U.S.C. § 1985, a federal statute which provides a remedy for specified conduct (conspiracy to interfere with civil rights) which cannot accurately be described as a "violation" of 42 U.S.C. § 1985. In *Saratoga Sav. and Loan Ass'n v. Federal Home Loan Bank of San Francisco*, 724 F. Supp. at 683, the court held that the FELRTCA does not immunize federal employees from suits which "arise under" the United States Constitution or federal statutes.

(rather than as an amendment to any independently codified immunity statute),

> [Congress intended to] make it clear that the changes made by [the FELRTCA] do not alter either express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by the Supreme Court in such cases as *Cort v. Ash*, 422 U.S. 66 (1975); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); *and Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Clearly, [the FELRTCA] does not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other federal statutes.

H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. & Admin. News at 5950-51.

In each of the cases cited by Congress in this excerpt from the legislative history, this Court recognized that a right of action may be inferred from a statute which does not expressly create a right of action. *See Cort v. Ash*, 422 U.S. at 66; *Piper v. Chris-Craft Industries*, 430 U.S. at 1; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 44 U.S. at 11. Indeed, each case affirms the well-established principle that a right of action may be inferred in favor of the particular class intended to be protected by the statute where congressional purposes are likely to be undermined absent that inference. *See, e.g. Piper v. Chris-Craft Industries*, 430 U.S. at 25. "The critical inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action". *Id.*

As such, Congress expressly contemplated that subsection (b)(2)(B) of the FELRTCA would permit tort

claimants to sue individual federal employees for causes of action arising expressly *and* by implication from the Gonzalez Act and other federal statutes.[16]

There is therefore no evidence that Congress intended the FELRTCA to replace the existing patchwork system of immunity with a single integrated immunity scheme that would supercede and repeal the Gonzalez Act or the host of other pre-FELRTCA immunity statutes tailored to the concerns of specific branches or functions of government. *See e.g.* 22 U.S.C. § 2702 (1980) (immunity statute covering State Department employees); 38 U.S.C. § 4116 (1965) (immunity statute covering Veterans Administration employees); 42 U.S.C. § 2458a (1976) (immunity statute covering NASA employees); 42 U.S.C. § 233 (1970) (immunity statute covering Public Health Service employees); 10 U.S.C. § 1054 (1986) (immunity statute covering Department of Defense lawyers). Nor is there a single word in the text or legislative history of the

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[16] In this case, application of the factors enunciated in *Cort v. Ash*, 422 U.S. at 66, and subsequent cases easily requires a finding that the Smiths enjoy a right of action against Dr. Marshall pursuant to the Gonzalez Act. Clearly, the Smiths are members of the class of medical negligence victims for whose particular benefit the Gonzalez Act was enacted. The legislative history confirms Congress' intent to create a remedy on their behalf. The statute itself contains language pertinent only to a right of action against a military physician for damages. 10 U.S.C. § 1089(f). The implementing regulation requires the United States to pay the judgment obtained by the Smiths. *See* SECNAV Instruction 6300.3, Apx. at 1. Under these circumstances, a right of action against a military physician for claims arising in a foreign country need not be inferred; it is express and irresistable. *See Cort v. Ash*, 422 U.S. at 82.

Gonzalez Act that purports to withdraw any judicial remedy previously available to medical malpractice claimants like the Smiths. The court of appeals' holding that the FELRTCA does not "take away" the Smiths' Gonzalez Act remedy therefore finds ample support in the express language of the Act.

ii. The FELRTCA does not impliedly repeal or amend the Gonzalez Act

The United States asserts that the FELRTCA, by not expressly permitting the Smiths to pursue their Gonzalez Act remedy, now impliedly precludes them from doing so, and that the court of appeals should have so held.

It is well-settled that this Court may look beyond the express language of a statute to give force to Congressional intent where the statutory language is ambiguous or a literal interpretation would thwart an overall statutory scheme or lead to absurd results. *United States v. Oregon*, 366 U.S. 643, 648 (1961); *United States v. Public Utilities Commission*, 345 U.S. 295, 315 (1953). In this case, the court of appeals properly concluded that the express language and legislative history of the FELRTCA uniformly demonstrate that Congress did not intend to supercede the Gonzalez Act, but intended for the Gonzalez Act to remain an operative part of the integrated statutory scheme enacted by Congress to protect federal employees from personal tort liability. *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News at 5995.

As between the FELRTCA and the Gonzalez Act, only the Gonzalez Act addresses the narrow issue as to the

form of immunity applicable to a military physician with respect to claims arising out of medical negligence committed within the scope of his military medical duties in a foreign country.[17] Established principles of statutory construction dictate that a statute which, like the Gonzalez Act, covers a narrow, precise and specific subject is not submerged by a later-enacted statute covering a more generalized spectrum and that absent a clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.[18] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). "The issue breaks down to whether a clear intention otherwise can be discovered, whether, in short, it can be fairly concluded that the [later statute] operated as a

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[17] As set forth in the legislative history of the Gonzalez Act, Congress expressly recognized that the Federal Tort Claims Act does not apply to actions arising overseas and designed subsection (f) indemnification to immunize a military physician from personal liability for all claims arising in foreign countries. *See* S. Rep. No. 94-1264, 1976 U.S. Code Cong. and Admin. News 4443, 4451.

[18] In *Morton v. Mancari*, 417 U.S. 535, this Court articulated:

> The reason and philosophy of the rule is that when the mind of a legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter one such a construction, in order that its words shall have any meaning at all.

417 U.S. at 551.

pro tanto repeal of [the earlier one]." *Bradley v. Kissinger*, 418 F. Supp. 64 (D.D.C. 1976). Such an intention on the part of the legislature to repeal must be clear and manifest. *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). It is not enough to show that the two statutes produce differing results when applied to the same facts for that no more than states the problem; rather, the presumption against the implied repeal of statutes requires the court, when two statutes are capable of co-existence, to regard each as effective. *See Morton v. Mancari*, 417 U.S. at 551; *United States v. Vuitch*, 402 U.S. 62 (1971).

The presumption against implied repeals has been a part of this Court's jurisprudence since at least 1842. *See Wood v. United States*, 41 U.S. (16 Pet.) 342, 362-3 (1845) (Virtual repeals are not favored by courts); *United States v. Tynan*, 78 U.S. (11 Wall.) 88, 92 (1871). As Justice Blackmun observed in his concurring opinion in *United States v. Fausto*,

> [the presumption against implied repeal] is a firmly entrenched part of the legal landscape against which Congress works. We can presume with certainty that Congress is aware of this longstanding presumption and that Congress relies on it in drafting legislation. Necessarily, we must presume that Congress drafted [the Civil Service Reform Act] in the context of our assurances that the Act's language would not lightly be found to repeal existing statutes . . . If we construe a statute in a different legal environment than that in which Congress operated when it drafted and enacted the statute, we significantly increase the risk that we will reach an erroneous interpretation. This danger further enhances the need for us to be faithful to our

484 U.S. at 463.

> duty to read statutes consistently whenever possible and to find repeals by implication only when differences between the earlier and later enactments are irreconcilable.

Id. at 850, n. 9.

> Accordingly, to find an implied repeal,
>
> [t]here must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy . . . It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.

Chew Heong v. United States, 112 U.S. 536 (1884), *quoting Wood v. United States*, 41 U.S. (16 Pet.) at 342 and *State of South Carolina v. Stoll*, 84 U.S. (17 Wall.) 425 (1873).

In this case, the legislative history demonstrates that Congress enacted the FELRTCA to address the "dramatic change" in common law principles of immunity that resulted from the decision of this Court in *Westfall v. Erwin*, 484 U.S. 292 (1988)[19]; the single "functional effect"

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[19] Congress believed that federal employees prior to *Westfall* were absolutely immune from personal tort liability arising out of activities within the scope of employment under the principles enunciated in *Barr v. Matteo*, 360 U.S. 564 (1959). *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News at 5946. In Congress' view, the Supreme Court in *Westfall* "added an additional requirement for immunity when a federal employee is sued in his personal capacity . . . the Federal

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of the FELRTCA was to return federal employees affected by the *Westfall* decision to the status they held prior to the *Westfall* decision.[20] *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News at 5945, 5947.

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employee not only must have been acting within the scope of employment (the original standard) but must also have exercised governmental discretion in acting." *Id.* Congress feared that whether an employee was exercising governmental discretion was a fact-based determination that could not be summarily resolved and would therefore give rise to substantial litigation expenses and potentially to personal liability for torts arising out of non-discretionary functions. *Id.*

[20] Accordingly, the stated purpose of the FELRTCA is "to protect federal employees from personal liability for *common law* torts committed within the scope of employment while providing persons injured by the *common law* torts of federal employees with an appropriate remedy against the United States". *See* 28 U.S.C. § 2679 (b). Thus, Congress intended that "the availability of suit under the Federal Tort Claims Act precludes any other civil action or proceeding from being brought against an individual Federal employee or his estate if *such action or proceeding would sound in common law tort*" and that the United States "will incur vicarious liability *only for the common law torts* of its employees which are committed within the scope of their employment". *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. & Admin. News at 5949 (emphasis supplied). The legislative history defines "common law torts" as *state* law causes of action predicated on the common or case law of the various states and traditional tort causes of action codified in *state* statutes that permit recovery for acts of negligence. *Id.* at 5950 (emphasis supplied).

In this case, the established principle that liability for negligence is determined according to the substantive law of the place where the negligence occurred may mandate a finding that the substantive law of Italy, not the [American] common law of tort, will govern this action. *See* Federal Rule of

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As set forth in the legislative history, Congress recognized that military physicians and other specific classes of federal employees were already protected by federal immunity statutes and were therefore not among those federal employees affected by the *Westfall* decision or the FELRTCA. *Id.* at 5948. Indeed, Congress envisioned that the *Westfall* decision would most severely affect lower-level clerical and other governmental employees whose torts were unlikely to involve the exercise of governmental discretion and who, because of their low-level positions, were unlikely to be insulated from the *Westfall* decision by pre-existing statutory immunities. *Id.* at 5946. Far from evidencing an intent to modify such pre-existing immunity statutes, Congress endorsed them as "substantial precedent" for the statutory immunities the FELRTCA would confer on the remainder of the federal workforce, stating:

> There is substantial precedent for providing an exclusive remedy against the United States for the actions of Federal employees. Such an exclusive remedy has already been enacted to cover the activities of certain Federal employees, including:
>
> * * *
>
> Medical Personnel. – The [Federal Tort Claims Act] is the exclusive remedy for medical

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Civil Procedure 44.1, which empowers the federal court to determine and apply the law of Italy or any other foreign country. *See also Rayonier, Incorporated v. United States*, 352 U.S. 315 (1957). That the instant suit is based on a federal statute, not on the common law, also demonstrates that this is not a common law tort action within the ambit of the FELRTCA.

> or dental malpractice on the part of the medical personnel of most Federal agencies. (See, e.g., 10 U.S.C. § 1089 regarding Department of Defense medical personnel; 22 U.S.C. 2458a regarding NASA medical personnel; 38 U.S.C. 4116 regarding Veterans Administration medical personnel; 22 U.S.C. § 2702 regarding State Department physicians; and 42 U.S.C. 233 regarding Public Health Service physicians).
>
> Military and Civilian Lawyers of the Department of Defense. – The [Federal Tort Claims Act] is the exclusive remedy for a claim arising out of legal assistance provided by legal staff within the Department of Defense. (10 U.S.C. § 1054)

Id. at 5948.

Thus, the legislative history unequivocally establishes that the FELRTCA was intended to apply to all federal employees whose tort immunity *vel non* had been governed by the common law and was not intended to affect employees already insulated from *Westfall* by pre-existing immunity statutes such as the Gonzalez Act. Because the Gonzalez Act and the FELTRCA are easily reconciled and indeed were intended to peacefully co-exist in this fashion,[21] the court of appeals correctly held

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[21] The statutes can also be reconciled by understanding that there are circumstances outside the ambit of the Gonzalez Act in which the FELTRCA may govern Dr. Marshall's immunity *vel non* for tort liability. By its terms, the Gonzalez Act applies only to torts committed "in the performance of medical, dental or related health care functions" within the scope of the military medical duties. 10 U.S.C. § 1089(a), Pet. App. at 28a. A military physician who commits a tort while engaged in

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that the Gonzalez Act was not superceded by the FELTRCA.

That Congress did *not* intend the 1988 enactment of the FELRTCA to impliedly repeal pre-existing immunity statutes is further demonstrated by its 1988 amendment of the Veterans Administration Medical Malpractice Immunity Act, 38 U.S.C. § 4116[22] to state that "the exception [to the United States' liability under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)] provided in section 2680(h) of title 28 [retaining the United States' sovereign immunity for assault and battery] shall not apply" to claims arising under that Act. If Congress had enacted the FELRTCA to repeal pre-existing immunity statutes, it

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non-medical functions (for example, while driving to a rifle range for weapons training or while attending classes on military justice) may well be among those federal employees whose tort immunity *vel non* is governed by the FELRTCA.

[22] Significantly, the Gonzalez Act was patterned after and is substantially similar to 38 U.S.C. § 4116, which Congress enacted in 1965 to immunize Veterans Administration employees from personal liability for medical malpractice judgments and to compensate malpractice victims. *See* 38 U.S.C. § 4116. In addition to having identical purposes, each act contains an almost identical opening subsection in which the Federal Tort Claims Act is made the "exclusive remedy" for specific torts. *See* 10 U.S.C. § 1089(a) and 38 U.S.C. § 4116(a). Each act also contains a subsection which, in almost identical terms, permits suit against an individual physician for medical negligence arising in a foreign country and provides that the physician shall be indemnified for any judgment rendered against him in that action. *See* 10 U.S.C. § 1089(f) and 38 U.S.C. § 4116(e).

surely would not have concurrently amended the Veterans Administration Medical Malpractice Immunity Act to provide a more comprehensive remedy to victims of medical negligence. To the contrary, the 1988 amendment of the latter statute to provide a remedy for assault and battery,[23] a cause of action likely to arise out of a physician's failure to obtain a patient's with informed consent, clearly evidences Congress' continuing intention to tailor immunity statutes to the particular functions of specific federal employees and to compensate the victims of their negligence.

Disingenuously, the United States asserts that its construction of the statutes at issue does not impliedly repeal the Gonzalez Act because that Act remains in force for the purpose of indemnifying physicians from judgments entered in foreign courts and has been repealed or amended *only* to the extent that subsection (f) formerly permitted medical malpractice claimants to sue military physicians in American courts for medical negligence occurring overseas. Brief for Petitioner at 33-4. Clearly, the presumption against implied repeals extends to the implied amendment of any statutory provision, precluding that inference where, as here, there is no express statutory language or legislative history to support it. *See United States v. Welden*, 377 U.S. 95 (1964). *See also* 2A Sands, Sutherland Statutory Construction at § 22.30. The assertion that the Gonzalez Act has been repealed only to the extent it formerly provided a remedy to the Smiths is

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[23] The Gonzalez Act so provides at 10 U.S.C. § 1089(e).

a transparent, self-serving attempt to argue the construction most expedient at the moment and therefore represents precisely the mischief that the presumption against implied repeal was intended to prevent.[24]

Equally erroneously, the United States asserts that the presumption against implied repeal is inapplicable because the Gonzalez Act did not "create" a cause of action against Dr. Marshall. Whether such a cause of action was "created" is a semantic question with no bearing on the issue of implied repeal. Where, as here, it is undisputed that Congress has devised a comprehensive system to award payments for injuries arising out of military medical negligence committed abroad, a court may not adjudicate exceptions to that system absent specific legislation to that express effect. *See Johansen v. United States*, 343 U.S. 427, 441 (1952).

Because there is no evidence that Congress intended to alter the compensation system set forth in the Gonzalez Act or the implementing regulation, the court of appeals was duty-bound to incorporate this method of compensation as fairly and intelligently as possible into the entire statutory scheme, not to find that it has been impliedly superceded or repealed. *Id.*

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[24] The assertion is also inconsistent with the United States' concession that the Gonzalez Act makes subsection (f) indemnification available to a military physician sued for medical negligence claims arising in foreign countries without regard to where the action is ultimately maintained. *See* Pet. App. at 6a.

iii. The court of appeals' holding is consistent with the only other case authority addressing the relationship between the Gonzalez Act and FELRTCA

Of all discovered cases involving the FELRTCA, only one case (in addition to *Smith*) has addressed whether the FELRTCA supercedes or impliedly repeals other federal immunity statutes. *See Newman v. Soballe*, 871 F.2d at 969. In *Newman*, as in *Smith*, the issue was whether the FELRTCA superceded the Gonzalez Act with respect to claims arising out of medical negligence committed in a foreign country. Based on its review of the language and legislative history of the Gonzalez Act and the FELRTCA, the United States Court of Appeals for the Eleventh Circuit unequivocally held that the Gonzalez Act continues to define the scope of a military physician's immunity for medical negligence committed within the scope of his official duties in a foreign country. The court explained:

> [The FELRTCA], the new amendment to the [Federal Tort Claims Act], enacted after the Complaint in this case was filed, provides that whenever an individual United States employee is sued in common law tort for acts committed within the scope of employment, the exclusive remedy is against the United States. *See* Federal Employees Liability Reform & Tort Compensation Act of 1988, 1988 Amendment to 28 U.S.C. § 2679. This amendment, enacted to negate the recent Supreme Court decision of *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580, 98 L.Ed.2d 619 (1988), *is expressly designed to immunize from personal tort liability those federal employees not protected by other immunity statutes. See* H. Rep. 100-700, 100th Cong. 2d Sess. 2, 1988 U.S. Code Cong. & Admin. News at 5945.

> *As a military physician, the [defendant-physician] is specifically protected by the Gonzalez Act and is therefore not among those federal employees affected by the Westfall decision or the amendment.* Cf. H. Rep. 100-700, 100th Cong. 2d Sess. 4, 7, U.S. Code Cong. & Admin. News 1988, pp. 5947, 5950. *More importantly, the amendment is part of the [Federal Tort Claims Act] and only applies in situations where the [Federal Tort Claims Act] itself would apply.* The new amendment and subsection 2680(k) are both part of the same chapter of the [Federal Tort Claims Act], chapter 171. *Subsection 2680(k) expressly holds that the provisions of chapter 171 shall not apply to claims arising in a foreign country. Because the Newmans' claim arises in a foreign country, the new amendment does not apply to this case and we must look to the Gonzalez Act to resolve this case.*

Id. at 971 (emphasis supplied).

As such, the holding of the court of appeals in *Smith* is consistent with the only other authority to have addressed the relationship between the FELRTCA and the Gonzalez Act.

iv. The court of appeals' holding accords with the manifest purposes of the Gonzalez Act and the FELRTCA.

Erroneously, the United States asserts that the holding in *Smith* undermines the purpose of the FELRTCA, particularly Congress' desire to immunize federal employees without regard to whether an alternative remedy obtains against the United States, by permitting a tort claimant to maintain an action against the federal employee responsible for the tort whenever a Section

2680 exception precludes a federal tort claim remedy against the United States. Brief of Petitioner at 18.

This argument is predicated upon a fundamental misstatement of the reasoning behind the court of appeals' holding in *Smith*. Irrefutably, the court of appeals did *not* decline to apply the FELRTCA simply because the foreign country exception precludes a remedy against the United States. Instead, the court of appeals held that the FELRTCA is inapplicable because a more specific federal immunity statute designed to apply in precisely this circumstance expressly makes Dr. Marshall susceptible to suit for claims arising in "a foreign country . . . or if the circumstances are such as are likely to preclude the remedies of third persons against the United States."[25] 10 U.S.C. § 1089(f). Next, the court of appeals reasoned that the FELRTCA did not alter this immunizing scheme by permitting a remedy to obtain against the United States for tort claims arising in a

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[25] The "circumstances precluding" language of subsection (f) and its legislative history strongly suggest that Congress appreciated the enormous gravity of the harm likely to arise out of medical malpractice and did not intend to foreclose the remedies of medical malpractice victims under any circumstances. Although the court of appeals did not rely on this provision (relying instead on the provision for "claims arising in a foreign country"), the provision is additional support for the court of appeals' holding. *See* 10 U.S.C. § 1089(f).

Even if the court of appeals had relied on the "circumstances precluding" language of subsection (f), its holding would necessarily have permitted only medical malpractice claimants to sue military physicians within the ambit of the Gonzalez Act and would not have diminished the immunities of any federal employee within the ambit of the FELRTCA.

foreign country and therefore did not "take away" the Smiths' Gonzalez Act remedy or otherwise apply to this case.

Making this express, narrowly-drawn Gonzalez Act remedy available to the Smiths does not provide a precedent for non-medical malpractice claimants to sue individual federal employees, nor does it otherwise threaten the structural integrity of the FELRTCA.

Where, as here, the court of appeals' judgment was predicated upon a proper finding that the FELTRCA does not supercede the Gonzalez Act, this Court may not overturn that judgment on the basis of a mere challenge to the manner in which the opinion was expressed. *See e.g., Chevron, USA v. Natural Resources Defense Council,* 467 U.S. at 842.

Throughout this litigation, the United States has disparaged the significance of the immunity from personal liability which the Gonzalez Act accords Dr. Marshall. To understand that Congress' desire to immunize federal employees from personal tort liability is well-served by subsection (f) indemnification, one need only appreciate that subsection (b)(2)(B) of the FELRTCA permits plaintiffs to sue federal employees for violations of the Constitution or federal statutes and provides no indemnification or other form of immunity from personal liability to employees sued in those circumstances. Far from frustrating the purpose of the FELRTCA, the holding of the court of appeals accords with the purpose of each statute by permitting the Smiths to maintain an action against Dr. Marshall and by immunizing him from personal liability for the resulting judgment.

The only result that would frustrate Congress' intent is the one advocated by the United States. If the United States were to prevail, the parents of a helpless tort victim, now eight years old and without cognitive life, will never receive compensation that would at least address the enormous cost of caring for their brain-devastated child, and a military physician will avoid a judgment which the Gonzalez Act and the implementing regulation require the United States to pay. The legislative history of each statute at issue establishes that Congress did not intend this unconscionable result, that Congress enacted the Gonzalez Act to provide the Smiths a remedy for their son's tragic injury, and that Congress did not enact the FELRTCA to take that remedy away.

CONCLUSION

For the aforestated reasons, Respondents Marcus, Hildegard and Dominique Smith respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, D.C. 20350

SECNAVINST 6300.3
JAG: 14C
14 March 1978

SECNAV INSTRUCTION 6300.3

From: Secretary of the Navy

To: All Ships and Stations

Subj: Medical Malpractice Claims Against Military and Civilian Personnel of the Armed Forces

Ref: (a) DOD Directive 6000.6 of 24 August 1977

(b) Public Law 94-464. § 1(a). 90 Stat. 1985, Title 10, United States Code. Section 1089

(c) Title 10, United States Code, Section 2733, Military Claims Act

(d) Title 28, United States Code, Section 1346(b)

1. **Purpose.** This instruction implements reference (a) by assigning responsibility for administering the provisions of reference (b) to the Judge Advocate General.

2. **Background.** Prior to enactment of reference (b), some health-care officials were immune from suit by the legal doctrine of official immunity; however, the outcome of any judicial decision on a particular fact situation could not be predicted with any certainty. The intent of the Congress in passing reference (b) was to insulate all Department of Defense, Coast Guard, and Central Intelligence Agency medical personnel from the expense of defending malpractice suits and the cost of paying judgments or settlements in such suits.

3. **Effective date.** Reference (b) pertains only to those claims accruing on or after 8 October 1976.

4. **Persons Covered.** All physicians, dentists, nurses, pharmacists, paramedical or other supporting personnel, including medical and dental technicians, nursing assistants, and therapists of the Armed Forces, the Department of Defense, or the Central Intelligence Agency performing medical, dental, or related health-care functions (including clinical studies and investigations) are covered so long as the alleged malpractice occurred while acting in the scope of duties or employment.

5. **Scope of Employment.** All officially assigned duties are considered to be in the scope of employment. This includes, among other things, health care performed by Navy personnel assigned to a civilian hospital, and health care performed by civilians training with or otherwise assigned to the Navy. Scope of employment does not include employment of Navy personnel at civilian health care facilities during nonduty hours ("moonlighting").

6. **Extent of Protection.** Reference (b) extends coverage within the United States and its possessions by making suit against the United States under the Federal Tort Claims Act the exclusive remedy for an injured party. Where the Federal Tort Claims Act does not apply (as, for example, where the acts giving rise to the claim occurred outside the United States), coverage is provided by allowing the Secretary of Defense to hold harmless or provide liability insurance for health care personnel.

7. **Exercise of Authority.** By reference (a), the Secretary of Defense delegated to the Secretary of the Navy the authority to hold harmless or provide liability insurance

for Navy health care personnel. All persons referred to in paragraph 4 above and in subsection (a) of reference (b) are hereby held harmless for damages resulting from negligent or wrongful acts or omissions while acting within the scope of duties and assigned to duty in a foreign country, or detailed for service with other than a Federal agency, or if the circumstances are such as are likely to preclude remedy against the United States under the Federal Tort Claims Act, as provided by subsection (f) of reference (b).

8. **Action**

(a) By the defendant. Health care personnel of the Department of the Navy who are sued for Navy-related activities shall immediately deliver all process and pleadings served upon them (or an attested true copy thereof) to the commander of the naval installation where they were attached at the time of the incident giving rise to the suit.

(b) By a commanding officer

(1) Upon receipt of process and pleadings as provided above, the commanding officer shall promptly furnish copies to the appropriate United States Attorney, to the Attorney General, and to the Secretary of the Navy (Judge Advocate General).

(2) Upon receipt of process or pleadings, or upon notice of any claim or potential claim, an investigation conforming to Chapter XX, JAG Manual, shall be conducted promptly and the commanding officer shall report in the endorsement whether or not the acts giving rise to

the claim were performed in the scope of official duties or employment.

(3) Upon learning that a claim or lawsuit has been filed, the Judge Advocate General (Code 14C) shall be notified immediately by message or telephone. If no investigation was conducted, such will be expedited. Certified copies of all claims, service of process, and pertinent papers shall be forwarded by ordinary mail to the Judge Advocate General (Code 14C) and to the Officer in Charge of the nearest Naval Legal Service Office.

(c) By the Judge Advocate General. The Judge Advocate General may redelegate authority and assign tasks to appropriate naval commands to ensure the following:

(1) The Judge Advocate General shall maintain liaison with the Attorney General and the appropriate United States Attorney.

(2) The Judge Advocate General shall provide the Attorney General adequate information upon which to base the scope-of-employment determinations required by reference (b).

(3) The Judge Advocate General shall monitor each case to ensure that, whenever appropriate, such cases shall be transferred to the appropriate U.S. District Court and deemed a tort case against the United States.

(4) The Judge Advocate General shall arrange through the Department of Justice to defend actions brought against Navy health care personnel for acts performed in the scope of their duties or employment. The procedures of the Military Claims Act (10 U.S.C. § 2733)

shall be used to determine costs, settlements, or judgments against such individuals.

W. GRAHAM CLAYTOR, JR.
Secretary of the Navy

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